No. 15552

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

First Western Savings and Loan Association and Silver State Savings and Loan Association,

Appellants,

vs.

Mae Anderson, Trustee of the Estate of Rose Holding Corporation, and Gordon L. Hawkins,

Appellees.

Appeal From the United States District Court for the District of Nevada.

APPELLANTS' BRIEF.

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Jurisdiction.

Jurisdiction of the District Court in this proceeding is based on Chapter X of the Bankruptcy Act (11 U. S. C. A. 501-676), the debtor having filed a voluntary petition for reorganization under the provisions of said chapter.

Jurisdiction of this Court on appeal is based upon Section 250 of the Bankruptcy Act (11 U. S. C. A. 650) The appeal is from an order making allowances of compensation to the trustee and the attorney for the trustee and making such allowances a first lien upon all the property of the debtor.

Statement of the Case.

The debtor filed a voluntary petition under Chapter X of the Bankruptcy Act in the United States District Court for the District of Nevada, on May 3, 1956 [Tr. Vol. I, p. 1, line 1, to p. 13, line 10]. On the same day the said Court approved *ex parte* the said petition [Tr. Vol. I, p. 14, line 1, to p. 25, line 14].

The debtor had no money at all [Tr. Vol. II, p. 17, lines 8-11; Vol. I, p. 11, lines 4-8]. There were no corporate books or records, the debtor having been run by one man who operated several corporations and transferred property from one to the other [Tr. Vol. I, p. 40, lines 8-13]. According to the petition for reorganization, the sole assets of the debtor were a shopping center and two unimproved lots [Tr. Vol. I, p. 11, lines 4-8]. The shopping center had not been completed and lacked plumbing, cooling and heating, and had no septic tank [Tr. Vol. II, p. 11, lines 14-20; p. 14, lines 3, 4]. The roof had not been completed [Tr. Vol. I, p. 46, lines 14-16]. There were seven mechanics' liens filed against it [Tr. Vol. I, p. 3, line 22, to p. 4, line 4].

The debtor became owner of record of the shopping center on May 21, 1956, the day before the petition for reorganization was filed [Tr. Vol. II, p. 56, line 3, to p. 57, line 9].

At the time of the filing of the debtor's petition, appellant Silver State Savings and Loan Association held a first deed of trust on the shopping center. The deed of trust secured a note in the unpaid principal amount of $96,331.00, with interest from November 1, 1955. A trustee's sale of the shopping center had been scheduled to take place on May 4, 1956, by reason of the debtor's default in payment [Tr. Vol. I, p. 4, lines 5-11].

Although on several occasions the Court below stated that no plan of reorganization appeared possible [Tr. Vol. II, p. 14, lines 5-7; p. 15, lines 4-6; p. 62, lines 5-9; p. 65, lines 19-20], it granted two lengthy extensions of time to the trustee to file a plan of reorganization [Tr. Vol. II, p. 78, lines 19-23; p. 84, lines 15-19; p. 103, lines 11-14]. These extensions were granted over the objections of appellants [Tr. Vol. II, p. 77, lines 6-9; p. 87, line 3, to p. 88, line 17], and upon representations of the trustee that a plan was likely to be filed [Tr. Vol. II, p. 84, line 24, to p. 85, line 1]. No plan of any kind was ever filed or submitted [Tr. Vol. II, p. 150, lines 19-21; Vol. I, p. 97, lines 7, 8].

On January 20, 1957, the Court denied the Motion of appellant Silver State Savings and Loan Association to vacate the order approving the debtor's petition [Tr. Vol. II, p. 106, lines 11-17].

By order dated March 29, 1957, the Court below awarded the trustee an allowance in the sum of $5,000.00, and her attorney an allowance in the sum of $2,500.00, and made the allowances a first lien on all the property of the debtor [Tr. Vol. I, p. 99, line 21, to p. 100, line 5]. The Court below refused to allocate the lien to any specific property of the debtor [Tr. Vol. II, p. 167, line 21, to p. 168, line 14].

Thereafter, and on May 7, 1957, a Petition for Leave to Appeal and Brief in support thereof was filed in this Court. On May 14, 1957, an order was entered allowing the said appeal [Tr. Vol. I, p. 111, lines 1-20] On May 25, 1957, a Motion for Leave to File Typewritten Transcripts was filed, and by letter dated May 27, 1957, appellants were advised than an order of approval had been endorsed on the said motion.

Specification of Errors.

1. The Court below erred in making the allowances to the trustee and the attorney for the trustee a first lien upon the real property of the debtor.

2. The Court below erred in awarding unreasonable allowances to the trustees and to the attorney for the trustee.

Summary of Argument.

The allowances to a trustee and her attorney in an abortive Chapter X reorganization proceeding should not be made a lien superior to that of secured lienholders on real property having no equity, particularly where the proceedings were delayed due to requests of the trustee, who never formulated or presented any plan of reorganization, but rather attempted unsuccessfully to sell the assets, the debtor was hopelessly insolvent, the secured lienholders objected to the proceedings, and the security of the lienholders was impaired during the pendency of the proceedings due to the fault of the trustee.

If, nevertheless, the allowances were validly made a prior lien, then the allowances of $5,000.00 to the trustee and $2,500.00 to the trustee's attorney were not "reasonable."

ARGUMENT.

I.

Administration Expenses in an Abortive Reorganization Proceeding Should Not Be Made a Lien on a Debtor's Real Property Superior to That of a Holder of a Trust Deed Thereon.

There appears to be no precise authority in this Circuit on the issue here presented. However, in *In re Williams Estate*, 156 Fed. 934, 939 (1907), this Court held that the general costs of the administration of a bankrupt estate, such as the general fees of the trustee and his attorney, were not payable out of the proceeds of a sale of liened property, where the proceeds of the sale were less than the amounts of the liens. The Court there said that the proceeds

> ". . . are not chargeable with the general costs of the administration of the bankrupt's estate, such as the services of a receiver in carrying on the business of the bankrupt, the expenses and losses of such business, the fees of the attorney for such receiver, the general fees of the trustee or those of his attorney. If so, the valid lien upon the estate of the bankrupt, which the bankruptcy act expressly declares shall be unaffected by any of its provisions, might very readily be destroyed, as it would unquestionably be, should such costs equal or exceeds the proceeds of the entire estate of the bankrupt. In line with this ruling are the cases of Stewart v. Platt, 101 U. S. 731, 739, 25 L. Ed. 816; In re Utt, 105 Fed. 754, 45 C. C. A. 32; In re Prince & Walter (D. C.), 131 Fed. 546, 552; In re Bourlier Cornice & Roofing Co. (D. C.), 133 Fed. 958, 963; Loveland on Bankruptcy (3d Ed.), p. 775. See, also, Collier on Bankruptcy (6th Ed.), p. 497."

In *Duparquet v. Evans,* 80 L. Ed. 591, 595, 297 U. S. 216, 222, 223, the Supreme Court stated that under 77B of the Bankruptcy Act, "at times the holder of the lien may have his security modified or reduced by the plan of reorganization *when finally approved*" (emphasis supplied). As authority therefor the Court cited *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, 585, 79 L. Ed. 1593, 1602; 97 A. L. R. 1106; and *Continental Illinois National Bank & T. Co. v. Chicago, R. I. & P. R. Co.,* 294 U. S. 675-677, 79 L. Ed. 1127-1129.

In the *Louisville* case, the Supreme Court struck down on due process grounds provisions of the Bankruptcy Act which affected the rights of mortgagees. In its decision, the Court after tracing some of the history of the Bankruptcy Act, said as follows (295 U. S. at 583, 79 L. Ed. at 1601):

> "No bankruptcy act had undertaken to modify in the interest of either the debtor or other creditors any substantive right of the holder of a mortgage valid under federal law. Supervening bankruptcy had, in the interest of other creditors, affected in some respects the remedies available to lien holders. In Continental Illinois Nat. Bank & T. Co. v. Chicago, R. I. & P. R. Co., 294 U. S. 648, 79 L. Ed. 1110, 55 S. Ct. 595, where, in a proceeding for reorganization of a railroad under section 77 of the Bankruptcy Act, the District Court was held to have the power to enjoin temporarily the sale of pledged securities, this Court said: 'The injunction here in no way impairs the lien, or disturbs the preferred rank of the pledges. It does no more than suspend the enforcement of the lien by a sale of the collateral pending further action. It may be, as suggested, that during the period of restraint the collateral will decline in value; but the same may be said in respect of

an injunction against the sale of real estate upon foreclosure of a mortgage; and such an injunction may issue in an ordinary proceeding in bankruptcy, Straton v. New, 283 U. S. 318, 321, 75 L. Ed. 1060, 1088, 51 S. Ct. 465, 17 Am. Bank. Rep. (N. S.) 630, and cases cited.' (29 U. S. 676, 677.) 'The injunction here goes no further than to delay the enforcement of the contract. It affects only the remedy.' (294 U. S. 681.)"

The *Duparquet* decision, *supra,* has been held by the Seventh Circuit to preclude the very action taken by the Court below in the case at bar. In the case of *In re Freeport Standard Dairy Corporation,* 124 F. 2d 783, 784, the Court of Appeals for that circuit affirmed a district court's refusal to make fees of a trustee and his attorney a lien prior to that of a mortgage lien where no plan of reorganization has been filed.

"The only question presented in this summary appeal is whether or not the District Court erred in refusing to subject the mortgaged real estate to the payment of the compensation allowed for the services of the trustee, his attorney, and the attorney for the debtor in the reorganization proceedings.

". . .

"In considering this precise question under 77B, 11 U. S. C. A. §207, proceedings, this Court said: 'Duparquet Co. v. Evans, 297 U. S. 216, 56 S. Ct. 412, 80 L. Ed. 591, seems to leave no doubt that a mortgage lien may not be impaired in a 77B proceeding before a final plan of reorganization has been approved.' In re Forty-One Thirty-Six Wilcox Bldg. Corporation, 7 Cir., 100 F. 2d 588, 593.

"See, also, Louisville Title Mortgage Company v. Louisville Storage Company, 6 Cir., 93 F. 2d 1008,

affirming In re Louisville Storage Company, D. C., 21 F. Supp. 897; 8 C. J. S. Bankruptcy §872.

"The Chandler Act, providing a complete method of procedure in the reorganization of corporations in bankruptcy, has not changed this rule."

And in 1946, the Seventh Circuit, in the case of *In re Sheridan View Bldg. Corporation,* 154 F. 2d 1008, 1009, quoting from *In re Forty-One Thirty-Six Wilcox Bldg. Corp.* (7 Cir.), 100 F. 2d 588, said:

" 'We are forced to conclude in view of such authorities that a court is without right to allow fees or expenses except where they have been earned or incurred in connection with the formation of a plan of reorganization which has been theoretically at least, of benefit to all parties in interest.' "

The Second Circuit has had occasion to consider the point here involved. *In re Franklin Garden Apartments,* 124 F. 2d 451, 454, was a reorganization proceeding in which the mortgagee had taken possession of the corporate debtor's property under the terms of the mortgage which provided for the assignment of rents in case of default. In authorizing the use of the rentals by the trustee to pay current operating expenses only and not administration expenses, the Court said:

". . . there seems no justification for allowing them at the present time, or indeed for allowing them at any time, out of the security belonging to the mortgagee, except insofar as the mortgaged property has received benefit through the proceeding (Randolph v. Scruggs, 190 U. S. 533, 23 S. Ct. 710, 47 L. Ed. 1165; In re Centralia Refining Co., D. C. Ill., 35 F. Supp. 599, 602), or the mortgagee's rights are fully secured.' "

The *Centralia* case quoted by the Second Circuit in the *Franklin* case, is similar to the instant case. The debtor petitioned for reorganization. Its petition was approved and a trustee appointed. No plan was approved and the corporation was adjudged a bankrupt. The Court there held that administration expenses were not chargeable against the liened property, saying at 35 F. Supp. 599, 602, the following:

> "I am aware that this decision will work hardship upon innocent officers and appointees of the Court in the reorganization proceedings. This is to be regretted but there seems to be no lawful alternative. It must stand as warning to court, counsel and litigants to use care to avoid instituting corporate reorganization proceedings without the consent of the secured creditors in cases in which the available free assets or income are insufficient to meet the necessary costs of administration in event reorganization fails. Good faith in filing the petition is directly involved in such circumstances. I know of no valid reasons for a law which would permit the expenses of an abortive reorganization proceeding to be visited upon the holder of a valid pre-existing lien without his consent or fault."

Even if there were no authorities on the issue here presented, it would most obviously be an injustice under the facts of this case to charge petitioners with the administration expenses resulting from the reorganization proceeding. The petitioners loaned money and received notes secured by deeds of trust on real property. Title to the shopping center was recorded in the name of the debtor the day before the petition was filed [Tr. Vol. II, p. 56, line 21, to p. 57, line 9]. This was undoubtedly done for the purpose of hindering the petitioner Silver State Sav-

ings and Loan Association. Reorganizations are not for such purpose. *Provident Mutual Life Ins. Co. v. University Church* (C. A. 9), 90 F. 2d 992; *White v. Penelas Mining Co.* (C. A. 9), 105 F. 2d 725. Nor should property be acquired for the purpose of filing a petition. *In re Francfair,* 13 F. Supp. 513; *In re Hudson Coal Co.,* 22 F. Supp. 768.

Despite the efforts of petitioners to have the proceedings dismissed [Tr. Vol. II, p. 77, lines 6-9; p. 100, line 8, to p. 101, line 22; p. 106, lines 11-17], the trustee and her attorney kept the proceedings going [Tr. Vol. II, p. 78, lines 19-23; p. 84, lines 15-19; p. 84, line 24, to p. 85, line 1].

The debtor was hopelessly insolvent. According to the report filed by the trustee on March 14, 1957, stating why no plan was filed, she said that with respect to the shopping center the "face value of said Trust Deed exceeds the value of the property" [Tr. Vol. I, p. 96, lines 9-15] and "the other property owned by the corporation in Clark County in general had First Trust Deeds of a great deal more value than their sales prices" [Tr. Vol. I, p. 96, line 25, to p. 97, line 2].

The Trustee stated in her report under Section 167(1) that the debtor was "apparently operated almost exclusively by Louis T. Davidson, who also operated several other corporations in the area. He caused transfers of property from one to the other, negotiated loans and in general ran the corporation out of his pocket. He apparently had no official capacity as director or officer of the debtor" [Tr. Vol. I, p. 40, lines 8-13]. (Mr. Davidson was never examined nor even subpoened.)

It is incomprehensible to believe that such a debtor could be reorganized, particularly as its business, according to

its petition, was "the business of investments and real estate development" [Tr. Vol. I, p. 1, lines 23, 24].

Even the District Court recognized during the course of the proceedings that a plan of reorganization was not likely to be formulated [Tr. Vol. II, p. 14, lines 5-7; p. 15, lines 4-6; p. 62, lines 5-9; p. 65, lines 19-20]. And even though the Court below at each session stated that it would adjudicate the debtor a bankrupt if no plan was presented by the next session [Tr. Vol. II, p. 16, line 25, to p. 17, line 3; p. 80, line 20-22], it nevertheless granted two extensions to the trustee [Tr. Vol. II, p. 78, lines 19-23; p. 84, lines 15-19]. The Court did so, despite stating that it doubted the good faith of the petition and would never have approved it if he had known the facts [Tr. Vol. II, p. 62, lines 5-11]. The last extension granted was on the sole ground that only the petitioners would benefit if no extension was granted and the unsecured creditors would realize nothing [Tr. Vol. II, p. 102, line 19, to p. 103, line 7], and despite the objection that the estate was depreciating in value [Tr. Vol. II, p. 87, lines 3-20]. In this regard the trustee reported that the floors of the shopping center offices were damaged during a rainstorm because the roof had not been completed [Tr. Vol. I, p. 46, lines 14-16] and she apparently took no steps to prevent such damage.

If under the facts of this case, secured lienholders are charged with the allowances made by reason of the abortive proceeding, what good is a mortgage or a deed of trust? Would any lender be willing to lend money on the security of a mortgage or deed of trust if the lender may have to foot the bill for an abortive reorganization proceeding?

And if the allowances granted could properly be made first liens on the debtor's property, upon which property should they be liens? Aside from the liens of appellants, one Tommie Yarbrough holds a note securing a deed of trust on two lots [Tr. Vol. I, p. 27, lines 16-20]. In addition, there are seven mechanic's liens [Tr. Vol. I, p. 3, line 22, to p. 4, line 4]. Although the Court below was asked about this point, it refused to rule thereon.

> "Court: What I mean is all the liens are to be charged with the obligation to pay these allowances, and these are to be a priority over all the property.
>
> Mr. Lionel: There are several pieces.
>
> Court: On all the property.
>
> Mr. Lionel: Well how do you apportion it?
>
> Court: I don't know. Work that out. That is all I can do.
>
> Mr. Lionel: May I take an objection?
>
> Court: Yes.
>
> Mr. Lionel: This is intended to be prior to any liens?
>
> Court: This is to be a first lien on all property in this estate, and prior to any other liens on this property.
>
> Mr. Lionel: Even—
>
> Court: In other words, I want these allowances paid. That is my point.
>
> Mr. Lionel: You mean even to property which may not be within the jurisdiction.
>
> Court: You will have to look at the law." [Tr. Vol. II, p. 167, line 21, to p. 168, line 14.]

The petitioners are institutions lending the money of its investors. Its loans are secured by deeds of trust on real property. Surely, this security should not be impaired by making allowances of a proceeding of this nature prior liens.

II.

The Allowances Awarded to the Trustee and Her Attorney Were Not Reasonable.

Only if this Honorable Court holds that the administration allowances were properly made prior liens is this portion of the Argument material.

Section 241 of the Bankruptcy Act (11 U. S. C. 641) provides that the judge may allow ". . . reasonable compensation for services rendered . . . by the trustee and other officers, and the attorney for any of them."

This Court, in the case of *In re American Line, Ltd.*, 115 F. 2d 196, 198, stated that "the allowance is required to be 'reasonable'." And see *In re Mortgage Guaranty Co.*, 40 F. Supp. 226, 230. Reorganization proceedings should, consistent with the policy of Congress, be economically administered. *Callaghan v. Reconstruction Finance Corp.*, 297 U. S. 464, 80 L. Ed. 804; *Stark v. Woods Bros. Corporation*, 109 F. 2d 969, 973; *Silver v. Scullin Steel Co.*, 98 F. 2d 503, 505. In *Straus v. Baker*, 87 F. 2d 401, 407, the Fifth Circuit said that:

> ". . . all allowances should be made bearing in mind the spirit and purpose of the bankruptcy statutes, to keep administration costs to the lowest reasonable levels."

The tendency with respect to allowances in reorganization proceedings should always be towards moderation rather than liberality. *In re Tom Moore Distillery Co.*, 32 F. Supp. 382, 385; *In re Mortgage Guarantee Co.*, 40 F. Supp. 226, 230. Allowances should not be paid on the same scale as paid to those in private employment. *Finn v.*

Childs, 181 F. 2d 431, 435, 436; *Stark v. Woods Bros. Corporation,* 109 F. 2d 969, 973. Trustees and their attorneys are officers of the court and public servants, and their compensation should never be as large as those engaged in private employment. *In re National Department Stores,* 11 F. Supp. 633, 637, 638; *In re McGrath Mfg. Co.,* 95 F. Supp. 825, 829; *In re Arcturas Radio Tube Co.,* 35 F. Supp. 783, 785.

In considering whether an allowance is "reasonable," numerous criteria have been laid down by the courts. Some of these criteria are the value of the debtor's estate (*In re Pejepscot Paper Co.,* 35 F. Supp. 693, 695); the amount available for allowances (*In re Columbia Ribbon Co.,* 117 F. 2d 999, 1003; *In re Tom Moore Distillery Co.,* 32 F. Supp. 382, 385), the character and extent of the particular services (*In re Mortgage Guaranty Co.,* 40 F. Supp. 226, 230; *In re Pejepscot Paper Co., supra*), the experience and skill required and exercised (*In re Pejepscot Paper Co., supra; In re McGrath Mfg. Co.,* 95 F. Supp. 825, 829) and the results finally achieved (*In re Mortgage Guaranty Co., supra; In re Pejepscot Paper Co., supra*).

All of the cases cited in the preceding paragraph, with the exception of *In re Columbia Ribbon Co.,* were cases in which there was a reorganization. It would appear that by *a fortiori* reasoning the criteria should be applicable where no reorganization has been effected. In the *Columbia Ribbon* case, the Third Circuit said:

> "We think, however, in making such allowances in a proceeding where reorganization has failed, the court should fix the amount of the allowances in the light of the fund available for administration expenses and of other claims upon that fund."

In this circuit, in the case of *In re Barecloux,* 74 F. 2d 288, 294, the Court laid down the following rule with respect to an attorney's fee in a bankruptcy:

> "In determining a reasonable fee for the services rendered by the attorneys, it was necessary to consider the time spent, the intricacy of the questions involved, the size of the estate, the opposition encountered, the results achieved, the opinion evidence touching the reasonableness of the fee, and the economical spirit of the Bankruptcy Act itself."

In *Dee v. United Exchange Bldg., Inc.,* 88 F. 2d 372, 374, this Court said that the rule enunciated in the *Barecloux* case applied to a trustee's attorney and a reorganization manager. As the trustee's attorney and the trustee are awarded allowances under the same section of the Bankruptcy Act (Sec. 241, 11 U. S. C. 641), the rule undoubtedly was intended to apply also to the trustee's allowance.

Applying the rule of the *Barecloux* case to the allowances made to the trustee and her attorney, it will be readily seen that the allowances were not "reasonable."

In her application for fees, the trustee stated as follows:

> "Upon the appointment and qualification of your petitioner as Trustee she made a survey of the debtors property and its operation from which it appeared that said debtor owned certain real property within the County of Clark, State of Nevada, including one incomplete shopping center and several unimproved parcels of land; that the debtor corporation had never been in operation as a going concern, and that the property values did not exceed the debts of the said corporation. That your petitioner reported the results of her investigation in a report dated July 6,

1956, and filed in the above entitled court on the said date. It was very difficult to get any information concerning the property and activities of the debtor, since no books existed your petitioner interview Lindsey Jacobsen, who was alleged to be the accountant and McDonald and Denton, attorneys for the debtor. The operator of the debtor, Lou Davidson, was unavailable and in fact was indicted by the Federal Grand Jury during the period of the estate. The records of Clark County were finally resorted to, to determine interests in property. Your petitioner spent at least one hundred (100) hours to discover and prepare this report." [Tr. Vol. I; p. 82, lines 2-21.]

In addition, the debtor had no money [Tr. Vol. II, p. 17, lines 10, 11].

It is difficult to understand how the trustee ever expected to reorganize the debtor in view of the situation. And yet she secured two extensions of time in which to file a plan, which extensions consumed a five month period [Tr. Vol. II, p. 78, lines 19-23; Vol. II, p. 84, lines 15-19; p. 84, line 24, to p. 85, line 1].

Actually the trustee spent no time trying to reorganize the debtor, but rather spent her time trying to sell the shopping center.

"Q. Did you say you spent considerable time trying to sell those stores? A. Yes.

Q. About what percentage of your time would you say you spent for such a purpose? A. Well as I say, I spent full time from the time I was appointed until August and after that I believe part time. Perhaps I should say more than that actually.

Q. I see. And that was all trying to sell the premises. A. Not necessarily trying to sell them.

Actually calls, checking records—calls and various things, not only trying to sell the stores.

Q. Would you just tell me exactly what you did in attempting to reorganize the corporation? A. Well I have sent out all the notices. I have done anything that I assume any other Trustee would do under the same circumstances I have been placed in would do without any funds to operate with.

Q. You mean by that you have tried— A. In other words, I feel that if the first petition had of been granted I feel that the shopping center would have been occupied and rented if it had been completed.

Q. Did you ever formulate or draft any possible plan of reorganization? A. No." [Tr. Vol. II, p. 149, line 22, to p. 150, line 21.]

Actually the trustee's attempts to sell were made primarily through other real estate people [Tr. Vol. II, p. 139, lines 19-22]. In addition, she spent "considerable" time trying to sell some property in which she "assumed" the debtor had an "interest" [Tr. Vol. I, p. 77, line 22, to p. 78, line 1] and "considerable" time trying to sell two lots which the debtor had transferred three months before its petition was filed [Tr. Vol. I, p. 78, lines 10-17].

The trustee never corresponded with the stockholders, other than to send them monthly notices. She never wrote them to see if they were interested in reorganizing the debtor [Tr. Vol. II, p. 153, lines 1-15]. She never asked her attorney to subpoena them or Louis Davidson who ran the corporation and juggled its property [Tr. Vol. II, p. 153, line 16, to p. 154, line 8].

In her application for allowances, the trustee stated that she collected a total of $1,225.42 and expended $1,231.86

[Tr. Vol. I, p. 83, lines 21-24]. $388.84 of the expenditures were paid by the trustee to herself [Tr. Vol. I, p. 102, lines 17-20].

Prior to being appointed trustee, Mrs. Anderson worked for someone in the real estate business [Tr. Vol. II, p. 141, lines 3-5]. She testified her income in 1955 would be close to $5,000.00 [Tr. Vol. II, p. 142, lines 24, 25]. In her application. she asked for an allowance of $10,000.00 [Tr. Vol. I, p. 86, lines 14-16].

There was no opinion evidence offered as to the value of the evidence of the trustee. In this regard, it should be noted that the burden of proving the worth of services under the Bankruptcy Act is on the claimant. *Woods v. City National Bank & Trust Co. of Chicago,* 312 U. S. 262, 267, 268, 85 L. Ed. 820, 825.

With respect to the attorney for the trustee, it should be noted that he testified as follows:

> "Q. Do you feel bankruptcy matters are more involved than the average legal matters that you might be consulted upon? A. As far as I was concerned it was. Bankruptcy, especially this reorganization proceeding is practically a new field for me. . . ." [Tr. Vol. II, p. 160, lines 11-16.]

In his petition for allowances, the attorney sets forth 76½ hours of services. He asked for an allowance of $4,000.00 [Tr. Vol. I, p. 89, line 1, to p. 94, line 11]. The allowance of $2,500.00 awarded compensates him at the rate of more than $32.00 per hour.

This hourly rate can hardly be deemed a "reasonable" one for an attorney without experience in reorganization practice (*In re Pejepscot Paper Co.,* 35 F. Supp. 693, 695) handling a non-intricate matter (*In re Mortgage*

Guaranty Co., 40 F. Supp. 226, 230), and where the allowance should be less than that received for the same services in private employment (*Finn v. Childs,* 181 F. 2d 431, 435, 436).

Despite bankruptcy being a new field to the attorney, the petition does not specifically show any research time, although there is a statement in the petition that $6.25 was spent on research and to subpoena one witness, and the attorney had been reimbursed therefor [Tr. Vol. I, p. 93, lines 22-24].

Five (5) hours are shown as spent in a conference and preparation of a letter demanding back rent, as a result of which $200.00 was paid to the trustee [Tr. Vol. I, p. 92, lines 5-10]. At $32.00 an hour, this means that it cost the estate $160.00 to collect the $200.00. Is such a fee "reasonable?" Does it not violate the economical spirit of the Bankruptcy Act? And these services are the only services claimed by the attorney to have been performed in connection with the operation and management of the debtors property [Tr. Vol. I, p. 92, lines 3-10].

The petition of the attorney claims twenty (20) hours spent in consultation and preparing of the trustee's monthly reports [Tr. Vol. I, p. 93, lines 13-17]. At $32.00 per hour, the attorney is receiving $640.00 for his services with respect to reports that the trustee has been awarded a considerable sum to prepare. In her application for allowances, the trustee stated that she prepared the monthly reports [Tr. Vol. I, p. 84, line 25, to p. 85, line 2].

In his petition, the attorney for the trustee stated that he "prepared a list of creditors and stockholders and the Trustee's Report under Section 167 (1)" [Tr. Vol. I, p. 90, lines 15-18]. In the trustee's application, she stated that she "prepared and filed her report under Section

167 (1)," and "prepared and filed a list of creditors and stockholders [Tr. Vol. I, p. 84, lines 20-23]. Surely only the trustee or her attorney performed these services, and only one and not both should be compensated therefor.

There was no opinion evidence offered as to the value of the services of the attorney for the trustee.

Applying the rule of the *Barecloux* case to the allowances made, it will be seen that numerous criteria have been ignored. Certainly there were no intricate questions involved. The estate was almost non-existent by reason of the fact that there was no equity in any property. There were no assets of any kind other than the property, only one piece of which had improvements. Only $1,225.42 was collected by the trustee. The opposition encountered was solely the efforts of the petitioners to have the proceedings dismissed. There were no results achieved.

Manifestly the economic spirit of the Bankruptcy Act was violated in awarding the allowances totalling $7,-500.00 to the trustee and her attorney, especially as there were no funds available therefor (*In re Columbia Ribbon Co.,* 117 F. 2d 993, 1003) and they were made liens prior to the secured liens of the petitioners.

It is submitted that the allowances to the trustee and her attorney were not "reasonable" within the meaning of Section 241 of the Bankruptcy Act (11 U. S. C. 641).

Conclusion.

For the reasons stated herein, the appellants respectfully pray that the order of the court below making the allowances a prior lien on debtor's property be reversed.

Respectfully submitted,

SAMUEL S. LIONEL,

Attorney for Appellants.